No. 89-191

In the Supreme Court of the United States

OCTOBER TERM, 1989

MELVIN TAYLOR, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals was required to issue a written opinion when it denied a request for an award of fees and expenses under the Equal Access to Justice Act, 28 U.S.C. 2412 (1982 & Supp. V 1987).

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OPINIONS BELOW

The opinion of the court of appeals on the merits is reported at 786 F.2d 1516. The order of the court of appeals denying an award of attorney fees (Pet. App. 1a) is unreported.

JURISDICTION

The order of the court of appeals denying the motion for attorney fees was entered on March 31, 1989

(Pet. App. 2a). On June 26, 1989, Justice Kennedy granted an extension of time to and including August 3, 1989, within which to petition for a writ of certiorari, and the petition was filed on that date.

STATEMENT

1. Petitioner Melvin Taylor was discharged by respondent Ryder Truck Lines for refusing to drive a truck that he believed to be unsafe. An arbitral panel upheld Taylor's discharge under the collective bargaining agreement. The National Labor Relations Board, applying its decision in *Olin Corp.*, 268 N.L.R.B. 573 (1984) deferred to the arbitral decision and dismissed a complaint brought by the General Counsel alleging that the discharge violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1). 273 N.L.R.B. 713 (1985).

On a petition for review, the court of appeals disapproved the Board's *Olin* standard for deferral, held that the Board had improperly deferred to the arbitral decision and remanded for a determination of the merits. *Taylor* v. *NLRB*, 786 F.2d 1516 (11th Cir. 1986). On remand, the Board determined that Taylor's discharge violated Section 8(a)(1) of the Act and ordered that he be reinstated with back pay. *Ryder Truck Lines, Inc.*, 1987-1988 NLRB Dec. (CCH) ¶ 19,269 (Dec. 16, 1987). Ryder refused to comply with the order and, on the Board's application for enforcement, the court of appeals enforced the Board's order. *NLRB* v. *Ryder Truck Lines*, 863 F.2d 889 (11th Cir. 1988) (Table).

2. On September 30, 1986, after the court of appeals issued its remand order to the Board but before the Board had reconsidered the case, Taylor filed a petition for an award of fees and expenses under the

Equal Access to Justice Act (EAJA), 28 U.S.C. 2412 (1982 & Supp. V 1987).[1] The Board filed an opposition to the application, arguing that Taylor was not at that time a prevailing party, and that in any event he was not entitled to fees because the Board's position in the litigation had been substantially justified. On November 10, 1986, the court of appeals issued an order stating that "Petitioner's application for an award of attorney fees is Denied." Pet. App. 4a. Reconsideration was denied on December 8, 1986. *Id.* at 3a.

On January 14, 1988, after the issuance of the Board's decision on remand, Taylor filed a renewed application for an award of attorney fees and costs under EAJA. The Board moved for a stay of the consideration of the EAJA application pending resolution of the enforcement proceeding against Ryder then pending in the court of appeals, but on March 15, 1988, the court of appeals instead denied the renewed application for an award of fees as premature. Pet. App. 6a.

3. On December 21, 1988, Taylor filed a third application for an award of EAJA fees and expenses. The Board filed an opposition, arguing that the position of the Board had been substantially justified and that a charging party before the Board, such as Taylor, is not entitled to an EAJA award. The court of appeals denied Taylor's application without opin-

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[1] EAJA, 28 U.S.C. 2412(d)(1)(A) (1982 & Supp. V 1987), provides for a court award of attorney fees and other expenses to certain classes of private parties prevailing in any civil action brought by or against the United States, unless the court finds that the position of the government was "substantially justified," or that "special circumstances make an award unjust."

ion. Pet. App. 1a. Taylor's petition for rehearing was also denied without opinion. *Id.* at 2a.

ARGUMENT

1. It has long been the accepted practice of the appellate courts, including this Court, to dispense with the writing of opinions in certain cases. See Shaforth, *Survey of the United States Courts of Appeals*, 42 F.R.D. 247, 271 (table of number of dispositions per circuit without opinion in 1966); Fed. R. App. P. 36 (recognizing practice). The courts of appeals "have wide latitude in their decisions of whether or how to write opinions." *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972). This latitude is necessary, because the determination of whether the preparation of an opinion to explain the basis for a particular order is a wise expenditure of limited judicial resources depends so heavily on factors peculiarly within the knowledge of the court involved, and any requirement of an explanation of the basis for those determinations would quickly consume the very judicial resources to be conserved.[2]

There is, in any event, no reason to question the decision of the court below that the denial of attorney fees and expenses in this case did not merit an

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[2] The Eleventh Circuit, like many other circuits, has adopted a local Rule to define the circumstances in which the need to conserve scarce judicial resources outweighs the benefits of a written opinion on the merits of an appeal. See 11th Cir. R. 36-1; 5th Cir. R. 47.6; 2d Cir. R. 0.23 (noting that "[t]he demands of an expanding caseload require the court to be ever conscious of the need to utilize judicial time effectively"); 9th Cir. R. 36-1, R. 36-2; D.C. Cir. R. 14(c).

explanation.[3] The local Rules defining the circumstances in which decisions on the merits need not be accompanied by written opinions typically refer to circumstances in which an opinion would have no precedential value (11th Cir. R. 36-1; 5th Cir. R. 47.6; 2d Cir. R. 0.23). An opinion explaining this collateral order, which evidently turned on the conclusion that the agency's position was substantially justified on the particular facts of this case, would obviously have no precedential value.[4] Cf. *Taylor* v. *McKeithen*, 407 U.S. at 194-195 n.4 (remanding for the preparation of an appellate opinion in a legislative reapportionment case, because the Court was unwilling "to impute to the Court of Appeals reasoning that would raise a substantial federal question when it is plausible that its actual ground of decision was of more limited importance").

Noting that district courts acting on EAJA fee applications must explain the reasons for their decisions, petitioners contend (Pet. 6-7) that when courts of appeals "make the initial ruling on a fee request" they must be subject to the same requirement so that

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[3] The courts of appeals routinely have denied EAJA applications without written opinions. *See, e.g., G.W. Galloway Co.* v. *NLRB*, No. 86-1540 (D.C. Cir. Mar. 29, 1989); *Thomas R. Harberson* v. *NLRB*, No. 84-2488 (10th Cir. Mar. 15, 1988).

[4] Petitioners suggest that the order might have been based on the court's acceptance of the agency's alternative argument that a charging party could not be a "prevailing party" entitled to EAJA fees (see 28 U.S.C. 2412(d)(1)(A)). In light of 11th Cir. R. 36-1, it is highly unlikely that the court would have adopted that rationale, of obvious precedential importance, without writing an opinion explaining its basis for doing so. In any event, the order clearly stands for no such proposition.

the parties will have a basis for seeking rehearing en banc or a writ of certiorari. This argument by analogy overlooks the fundamental distinction between the losing party's right to appellate review of a district court determination and the discretionary nature of en banc and certiorari review. Because the court of appeals must review a district court's fee ruling at the request of the losing party whether or not that ruling involves issues that have any importance beyond the particular case, it is entitled to a record that is sufficient to permit informed review. But review of appellate court rulings is entirely discretionary. Unless there are issues of importance beyond the particular case, there is no legitimate basis for seeking further review.

Of course, if there are such issues, the lack of a written opinion does not preclude the parties from seeking rehearing or filing a petition for a writ of certiorari. For example, in *Northcross* v. *Board of Education*, 412 U.S. 427 (1973), the court of appeals, without opinion, denied costs and fees to the prevailing party in a school desegregation suit. The prevailing party sought certiorari, contending that the wrong standard had been applied in making that determination. The Court vacated and remanded the case because it was unable to determine whether the correct standard had been applied. *Id.* at 428-429. Here, petitioners do not challenge the denial of the EAJA award on the merits.[5] Had they done so, the

[5] The burden of demonstrating substantial justification or special circumstances in an EAJA case is on the government. *Spencer* v. *NLRB*, 712 F.2d 539, 557 (D.C. Cir. 1983), cert. denied, 466 U.S. 936 (1984). In its brief to the court of appeals the Board explained why it believed its *Olin* deferral position to be substantially justified and why it believed that,

Court, if it were concerned about the exact nature of the grounds for the decision below, could have followed the course it took in *Northcross*.

2. Petitioners' contention (Pet. 8) that the denial of a fee award without written opinion was a denial of due process is equally meritless. In the first place, petitioners' assertion (Pet. 8) that they have a constitutionally protectible property interest in their expectation of an award of attorney fees is unpersuasive. Under the principles established in *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972), petitioners have no more than "an abstract * * * desire [or] a unilateral expectation" of an award of EAJA fees, not a statutorily defined entitlement to them.[6] Although petitioners correctly observe that EAJA provides that the court "shall" award attorney fees to an eligible prevailing party unless it finds that the position of the United States was substantially justified or special circumstances make an award unjust, those two exceptions make the decision concerning whether to award fees highly discretionary. Cf. *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 9-11 (1979). Indeed, unless one were to assume that Congress concluded that the government routinely conducts litigation in which its position is not substantially justi-

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in any event, Taylor, as a charging party on whose behalf the General Counsel ultimately litigated the case to a successful conclusion, was not entitled to a fee award. Petitioners were not deprived of an opportunity to challenge either of those positions because of the lack of a written opinion. However, they chose not to do so.

[6] As this Court noted in *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 10 (1979), " 'there is a human difference between losing what one has and not getting what one wants' " (citation omitted).

fied, the award of EAJA fees was intended to be the exception, not the rule.

Even assuming that petitioners' expectation of a fee award is entitled to some measure of constitutional protection, they have clearly received all the process that is due. As this Court has observed (*Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. at 12-13, citations omitted):

> It is axiomatic that due process "is flexible and calls for such procedural protections as the particular situation demands." The function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions. Because of the broad spectrum of concerns to which the term must apply, flexibility is necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error.

See *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

Petitioners have received the full panoply of procedures attendant on judicial review of their request for an award of attorney fees, with the sole exception of a written opinion explaining the precise basis for the denial. They do not contend that a requirement of a written opinion would sufficiently increase the accuracy of the fee determination to justify the expenditure of judicial resources it would necessitate, nor could they reasonably make such a claim. Accordingly, due process does not require that the court of appeals memorialize the basis for its decision to deny an EAJA fee in a written opinion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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